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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1459

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION ET AL.,
Appellants,

v.

CITY COUNCIL OF THE CITY OF SAN DIEGO,
Appellee.

APPELLANTS' REPLY BRIEF

PAUL A. PETERSON
PETER B. GAMER
JAMES B. MEHALICK
JOHN D. THELAN
WHITE, PRICE, PETERSON & ROBINSON
Suite 2300, 530 "B" Street
San Diego, California 92101

Of Counsel:

STEPHEN J. POLLAK
JAMES R. BIEKE
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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I

THE DECISION BELOW DOES NOT REST ON AN INDEPENDENT STATE GROUND

The overriding constitutional issue in this case is: Assuming the San Diego City Charter and the State law otherwise sanction zoning by initiative, does zoning by initiative, without notice or hearing for affected property owners, violate the due process clause of the Fourteenth Amendment?

The California Supreme Court's decision regarding the use of the initiative process for zoning under local and State law specifically deals with, and the opinion is clearly based on, an erroneous resolution of this broad

constitutional issue.[1] Thus, the federal constitutional issue is squarely before this Court.

II

THE "LEGISLATIVE" NATURE OF THE ORDINANCE INVOLVED DOES NOT SUPPORT THE DECISION BELOW

Appellee argues that the ordinance limiting building height in the Coastal Zone of San Diego (Proposition D) was a general legislative act and that the due process requirements of prior notice and the opportunity for a hearing do not apply to such legislation, but "[o]nly where there is a small number of persons who are exceptionally affected . . ." (Motion to Dismiss or Affirm, p. 6).

However, it is clear that zoning, whether by ordinance or otherwise, and whether "legislative" or not, "can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance. What is done with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property."[2] Accordingly, as the cases cited in our Jurisdictional Statement recognize (pp. 7-17), the affected property owners have a constitutional right to notice and the opportunity for a hearing by a responsible and impartial decision-maker before such a zoning decision is made.

This is particularly true in the present case where the zoning decision in question applied only to a discrete

[1] The California Supreme Court first disposed of the preliminary question of the initiative use under the San Diego City Charter and then, in turn, passed upon the federal constitutional question presented by this appeal. Jurisdictional Statement, App. A, p. A-6.

[2] Dissenting opinion below, Jurisdictional Statement, App. A, p. A-20 (quoting *Johnston* v. *City of Claremont*, 49 Cal. 2d 826, 837 (1958)).

subgroup of property owners who were only a small percentage of the electorate voting thereon.[3] The burden of Proposition D falls solely upon those property owners within the Coastal Zone—"a small number of persons who are exceptionally affected"—and the appellee admits that in that situation prior notice and the opportunity for a hearing are required. Hence, at least where the zoning decision affects only one discrete sector of the electorate, zoning by initiative, without prior notice and a hearing for the affected property owners, violates the due process clause of the Fourteenth Amendment.

III

APPELLEE HAS NOT SHOWN THE ABSENCE OF A TRUE CONFLICT

The appellee makes no attempt to resolve the numerous conflicts which exist among the highest courts of several States concerning the constitutionality of land use regulations imposed without notice and hearing, whether by the electorate directly or by the elected legislative body.[4] Most notable are the decisions of *City of Scottsdale* v. *Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968), and *Forest City Enterprises, Inc.*, v. *City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1974), both of which are grounded on constitutional law laid down by this Court, and both of which are in irreconcilable conflict with the decision below. Moreover, the appellee's attempt (Motion to Dismiss or Affirm, p. 6, n. 6) to distinguish the decisions of this Court in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), is unsuccessful. See Jurisdictional Statement, pp. 7-10.

[3] Such application is evident from a review of the Jurisdictional Statement, App. F, "Map of the City of San Diego Showing 'Coastal Zone'."

[4] The "conflicts" are more fully discussed in the Jurisdictional Statement, pp. 12-17.

Appellee also contends that, in showing these conflicts, we have "confused the question of the validity of an initiative procedure with the substantive validity of the initiative ordinance enacted" (Motion to Dismiss or Affirm, p. 7). Contrary to this contention, however, appellants' challenge is to the initiative procedure by which Proposition D was adopted, just as the challenge in *Eubank* was to the petition procedure by which the setback lines were established; as the challenge in *Roberge* was to the consent procedure for the establishment of philanthropic homes; as the challenge in *City of Scottsdale* was to the initiative procedure for amending the zoning of a section of the city; and as the challenge in *Forest City Enterprises* was to the referendum procedure for changing existing land use.[5]

Accordingly, the conflicts between the holding below and the decisions of other States and the decisions of this Court are squarely before this Court in this appeal.

IV

THE ARGUMENT THAT THE ELECTORAL PROCESS PROVIDES ADEQUATE NOTICE AND OPPORTUNITY FOR A HEARING IS WITHOUT MERIT

Appellee, at p. 8 of its Motion to Dismiss or Affirm, erroneously states that the "electoral process itself provides both notice and opportunity to be heard to all electors." The California Supreme Court, however, held

[5] Thus, insofar as the appellee attempts to distinguish those cases because in them the constitutional attack was on the enactment which established the challenged procedure or on that procedure itself, whereas here the appellants' attack is cast in the form of an attack on the decision resulting from the challenged procedure, that is a distinction without a difference. In both situations, the issue presented is the validity of the procedure involved. In other words, the appellants are not here attacking the substantive validity of the height limitation established by Proposition D, but only the initiative procedure by which it was adopted.

that *no* notice and hearing are required prior to the enactment of a general zoning ordinance by initiative. Jurisdictional Statement, App. A, pp. A-6-7. Therefore, the question whether the initiative/electoral process furnishes adequate notice and hearing, where the same is required to satisfy due process, was not decided.

In any event, the highest courts of several States have held that prior notice and hearing are required to comply with due process in zoning matters, and that the initiative/electoral process is insufficient to satisfy such a requirement. Jurisdictional Statement, pp. 12-17. As these cases demonstrate, where a zoning decision is involved, particularly one affecting only a small portion of the community, the type of notice and opportunity to be heard that is provided by the electoral process (*Scottsdale* and *Forest City*) does not suffice—any more than that provided by the petition and consent processes (*Eubank* and *Roberge*)—to satisfy the due process requirements of notice and the opportunity for a hearing before a responsible body charged with applying rational standards impartially. See Jurisdictional Statement, p. 19, n. 11.[6]

V

CONCLUSION

The decision below does not rest upon an adequate non-federal ground, and it conflicts with prior decisions

[6] Contrary to the appellee's claim, the appellants' challenge to the procedure used in adopting Proposition D is not simply "that the people enacted the ordinance directly through the initiative process rather than through their elected representatives on the City Council" (Motion to Dismiss or Affirm, p. 8). It is the lack of *notice* and the chance for a *hearing* before a responsible body that is crucial. Thus, even if the City Council had enacted the ordinance, if those constitutional prerequisites had been lacking, then that procedure, too, would be subject to serious due process objections. See, *e.g.*, *Wood* v. *Town of Avondale*, 72 Ariz. 217, 232 P.2d 963 (1951).

of this Court and decisions of the highest courts of several States. The question presented is substantial and fundamental, potentially affecting the rights of landowners across the United States.

For these reasons and those stated in our Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

PAUL A. PETERSON
PETER B. GAMER
JAMES B. MEHALICK
JOHN D. THELAN
WHITE, PRICE, PETERSON & ROBINSON
Suite 2300, 530 "B" Street
San Diego, California 92101

Of Counsel:

STEPHEN J. POLLAK
JAMES R. BIEKE
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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